

WEBINAR

WEDNESDAYS



Wednesday, May 6, 2020

THE DOMESTIC VIOLENCE CYCLE AND THE USE OF COLD EXPERTS

Presented by:

Stacey Good
Assistant City Prosecutor, II
Mesa City Prosecutor's Office

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
3838 N. Central Ave., Suite 850
Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR



COLD EXPERTS AND DOMESTIC VIOLENCE

WHAT ARE COLD EXPERTS?

- ▶ SOMEONE WHO CAN EDUCATE THE JURY
- ▶ DOES NOT KNOW ANY OF THE WITNESSES
- ▶ NOT FAMILIAR WITH ANY OF THE FACTS
- ▶ JURY/JUDGE LEFT TO LINK UP COLD EXPERT'S TESTIMONY
TO THE FACTS OF THE CASE

WHY DO WE NEED THEM

- ▶ To help prove our case... obviously
- ▶ To attack a defense
 - ▶ Case in Chief OR Rebuttal
- ▶ TO EDUCATE!
 - ▶ Domestic Violence
 - ▶ Relationship Issues
 - ▶ Cultural Issues
 - ▶ Injuries
 - ▶ Victims Recanting

Demographics & Domestic Violence

from DomesticShelters.org

The likelihood of domestic violence varies widely depending on gender, race, education and income, as well as a series of psychographic characteristics such as sexual preference, substance abuse, history of family violence, and history of criminal activity.

85% of domestic violence victims are women



These rates are
30% – 50% HIGHER
than those experienced by Hispanic, White non-Hispanic women and Asian or Pacific non-Hispanic women.

The higher prevalence of intimate partner violence among ethnic minorities cannot be explained by any single factor, but seems to be related to risk factors such as substance abuse, unemployment, education, cohabitation of unmarried partners, pregnancy, income.



Most studies agree the majority of domestic violence perpetrators that come to the attention of criminal justice or court authorities have a prior criminal history for a variety of nonviolent and violent offenses against males as well as females, and of a domestic or nondomestic nature.

The most common age when intimate partner violence is first experienced by women is age



For men the most common age are



CASE LAW AND STATUTES

- ▶ RULES 702-705- Expert Witness Testimony
- ▶ RULE 401-404- Relevance
- ▶ RULE 104(a)- Preliminary Questions
- ▶ Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
- ▶ Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).
- ▶ State v. Salazar-Mercado, 234 Ariz. 590, 325 P.3d 996 (2014).
- ▶ State v. Haskie, 242 Ariz. 582, (2017).
- ▶ State v. Ketchner, 236 Ariz. 262, 339 P.3d 645 (2014).

Daubert v. Merrell Facts

- ▶ Petitioner (infants and guardians) sued Respondent claiming antinausea medicine (Benedictine) mothers took caused birth defects
- ▶ Respondent moved for summary judgment claiming medicine did not cause birth defects based on 1 expert's testimony regarding 30 published studies involving 130,000 patients and based on this review it did NOT cause birth defects
- ▶ Petitioner presented 8 expert witnesses with studies of invitro and invivo animal studies showing link between medicine and birth defects, chemical structural similarities between Benedictine and other medicines known to cause birth defects and reanalysis of previous studies on Benedictine

Daubert Lower Court Decisions Citing to Frye

- ▶ District Court: Granted summary judgment and precluded petitioner's expert testimony because scientific evidence is only admissible if it is generally accepted in the field to which it belongs
- ▶ Ninth Circuit: Affirmed- scientific evidence is not admissible unless it is "generally accepted as reliable in the relevant scientific community." Since the "community" already found that the medicine did NOT cause birth defects then any other scientific evidence could not be reliable...

Daubert Supreme Court

- ▶ Overturned and vacated lower court's ruling of summary judgment
- ▶ "General Acceptance" rule is displaced by the Federal Rules of Evidence
- ▶ Rule 702 requires trial judge to become gatekeeper
 - ▶ Is evidence reliable – does the expert have scientific knowledge
 - ▶ Is it relevant – does it help the trier of fact to understand or determine a fact at issue
- ▶ "we are confident that federal judges possess the capacity to undertake this review"

Supreme Court Decision Continued

▶ DAUBERT STANDARD

▶ Trial judge as the “gatekeeper” can consider these factors:

- 1) Reliability of expert's theory,
- 2) Peer review and publication,
- 3) Known or potential rate of error
- 4) Existence of standards and controls, and



WHAT IF THE TESTIMONY IS NOT
SCIENTIFIC

KUMHO TIRE CO.

Facts

- ▶ Plaintiff sued tire manufacturer after a tire blowout caused death to passenger
- ▶ Plaintiff's expert witness testified that tire manufacture was faulty based on visual and tactile inspection. This opinion was based on technical knowledge more than science
- ▶ District Court applied Daubert standard strictly and precluded Plaintiff's expert because the testimony did not meet requirements of the four factors for scientific testimony. Upon reconsideration applied a more liberal interpretation of Daubert but still did not find expert testimony reliable.
- ▶ 11th Circuit overturned this decision saying Daubert cannot apply at all because testimony is not scientific

KUMHO TIRE CO. Supreme Court Holding

- ▶ Daubert applies to ALL EXPERT TESTIMONY – 702 does not distinguish between
 - ▶ Scientific
 - ▶ Technical
 - ▶ Other Specialized Knowledge
- ▶ Judge as gatekeeper can use the factors set out in Daubert and any other factor to determine reliability that fits the facts of the case

RULE 702

- ▶ A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.

- ▶ An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

- ▶ (a) An opinion is not [automatically] objectionable just because it embraces an ultimate issue.
- ▶ (b) **EXCEPTION** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

- ▶ Evidence is Relevant if:
 - ▶ (a) it has ANY tendency to make a fact more or less probable than it would be without the evidence; and
 - ▶ (b) the fact is of consequence in determining the action

402

- ▶ RELEVANT EVIDENCE IS ADMISSIBLE unless any of the following provides otherwise
 - ▶ US or AZ Constitution
 - ▶ Statutes
 - ▶ Rules
 - ▶ Other rules prescribed by the Supreme Court
- IRRELEVANT EVIDENCE IS NOT ADMISSIBLE

- ▶ The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

RULE 15.1 EXPERT DISCLOSURE

- ▶ 15.1(b)(4) For each expert who has examined a defendant or any evidence in the case, or who the State intends to call at trial:
 - ▶ (A) The expert's name, address, and qualifications
 - ▶ (B) Any report prepared by the expert and the results of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and
 - ▶ (C) If the expert will testify at trial without preparing a written report, a summary of general subject matter and opinions on which the expert is expected to testify



OK SOOOOOO WHAT ABOUT
COLD EXPERTS?!

State v. Salazar-Mercado

Facts

- ▶ Defendant charged and convicted in Pima County with one count of sexual conduct with a minor and five counts of molestation of a child
- ▶ Prosecutor elicited expert testimony from a forensic interviewer holding a PhD in Justice Studies regarding Child Sexual Abuse Accommodation Syndrome explaining behaviors of child sexual abuse victims
- ▶ Expert testimony was to be cold and blind
 - ▶ Educate about certain subject
 - ▶ No knowledge about victims in the particular case
- ▶ Defense Objected arguing did not comply with Rule 702(d)

Salazar-Mercado Holding

- ▶ AZ Rule 702 changed in 2012 to conform the Federal Rule of Evidence 702
- ▶ So AZ Supreme Court looked to federal rule's background and application by federal courts
- ▶ Advisory Committee Notes-
 - ▶ old 702 rule and Federal case law allowed cold expert testimony to educate the fact finder.
 - ▶ Under new rule judges are now gate keeper
 - ▶ Cold experts NOT precluded from educating fact finder about general principles WITHOUT applying principles to specific facts

COLD EXPERTS

702(d) “the expert has reliably applied the principles and methods **to the facts of the case**”

- ▶ Does not bar cold experts from testifying
 - ▶ (d) only applies to experts who do apply principles to the facts of the case
- ▶ Cold testimony is admissible if
 - ▶ (1) expert is qualified
 - ▶ (2) testimony addresses a subject matter on which the factfinder can be assisted by the expert
 - ▶ (3) the testimony is reliable
 - ▶ (4) the testimony fits the facts of the case
- ▶ RELEVANT AND RELIABLE



CAN THIS BE APPLIED TO
DOMESTIC VIOLENCE CASES?

State v. Haskie

Facts

- ▶ Defendant strangled victim and threatened to kill her for cheating on him
- ▶ Victim wrote a statement describing the event
- ▶ Physical evidence from the scene corroborated her written statement
- ▶ Defendant arrested a year later
- ▶ After his arrest, Victim wrote two statements recanting her previous accusations

Haskie

State's Expert Testimony

- ▶ It is common for a victim to return to a relationship with an abuser
 - ▶ Fear
 - ▶ Retaliation
 - ▶ Threats
 - ▶ Pressure from family
 - ▶ Shame
 - ▶ Victims blame themselves
 - ▶ Also could be due to manipulation by abuser
- ▶ Accompanied by jail call between victim and defendant planning recantation

HASKIE HOLDING

- ▶ Cold Expert testimony can be used to describe behaviors of domestic violence victims
 - ▶ WHY VICTIMS CONTINUE TO BE IN RELATIONSHIPS WITH THEIR ABUSERS
 - ▶ WHY VICTIMS GIVE CONFLICTING STATEMENTS
 - ▶ WHY VICTIMS MIGHT BE RELUCTANT TO TESTIFY
- ▶ Must not be unfairly prejudicial or profile Defendant
- ▶ Helping the Factfinder understand the counterintuitive actions of domestic violence victims

State v. Ketchner

Facts

- ▶ Defendant and Victim had long history of domestic violence and continuous threats to kill her and other family members
- ▶ Victim obtained several orders of protections and while they were valid would still have contact with Defendant on occasion
- ▶ Victim started a break up and Defendant became upset about child support – acts of violence became more serious
- ▶ Victim had a birthday party for one of the children and did not allow Defendant to attend, he broke into the house and murdered one of her daughters and shot her in the head... she survived.

Ketchner State's Expert Testimony

- ▶ Educate jury about
 - ▶ Patterns of Domestic Violence
 - ▶ Characteristics of Victims
 - ▶ Characteristics of Abusers
- ▶ Testimony at issue:
 - ▶ Separation Assault – Abuser loses control and becomes exponentially more dangerous “very high risk period for homicide”

Ketchner Holding

- ▶ Expert's testimony was inadmissible profile evidence
- ▶ Predicting an abuser's reaction to losing control
- ▶ Inviting the jury to find that Ketchner's character matched that of an abuser who intended to kill his partner...

BE CAREFUL NOT TO PROFILE

“When someone decides to leave a violent relationship is a very dangerous time, because then the abuser feels their control has—they've lost their control and they'll use violence. It's a very high risk period for homicide when a person does leave the relationship. And it's another aspect of why people go back again, because they're not safe just because they leave the relationship.”

- ▶ Profile evidence tends to show that a defendant possesses one or more of an “informal compilation of characteristics” or an “abstract of characteristics” typically displayed by persons” engaged in a particular kind of activity

403 Analysis

- ▶ Haskie also discussed profile evidence
- ▶ Using Cold Expert to explain D.V. Victim's characteristics will almost always come with a discussion of Defendant's characteristics as well
- ▶ Even though evidence has propensity to be profile evidence does not make it automatically inadmissible
 - ▶ Must show that evidence is relevant
 - ▶ Its prejudicial effect does not substantially outweigh any probative value

Our Focus Should Be On

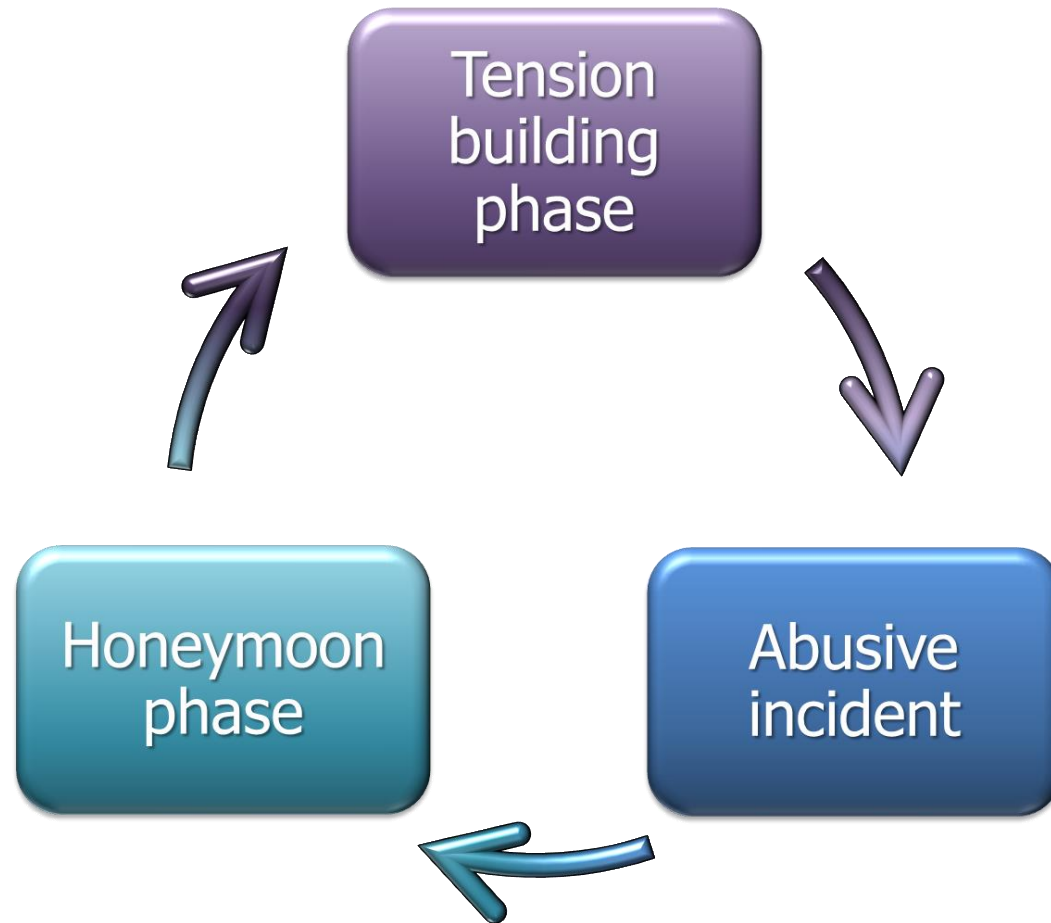
- ▶ General principles of Domestic Violence
- ▶ Impacts on the Victim
- ▶ Why the victim might act certain ways
- ▶ Make sure you don't link up profile evidence in your close...



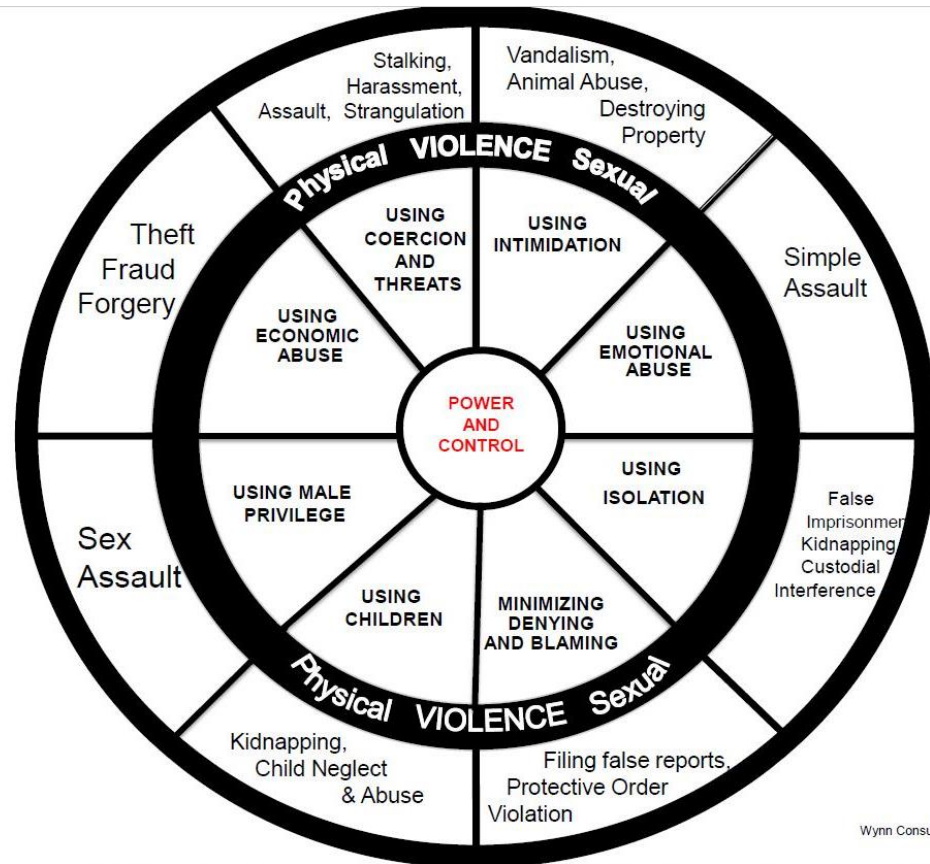
So how do we use the
expert?

WE NEED TO EDUCATE

SEXUAL ASSAULT:
A Trauma Informed
Approach to
Law Enforcement
First Response



Cycle of Domestic Violence



Wheel of Power and Control

REASONS VICTIM RELUCTANT

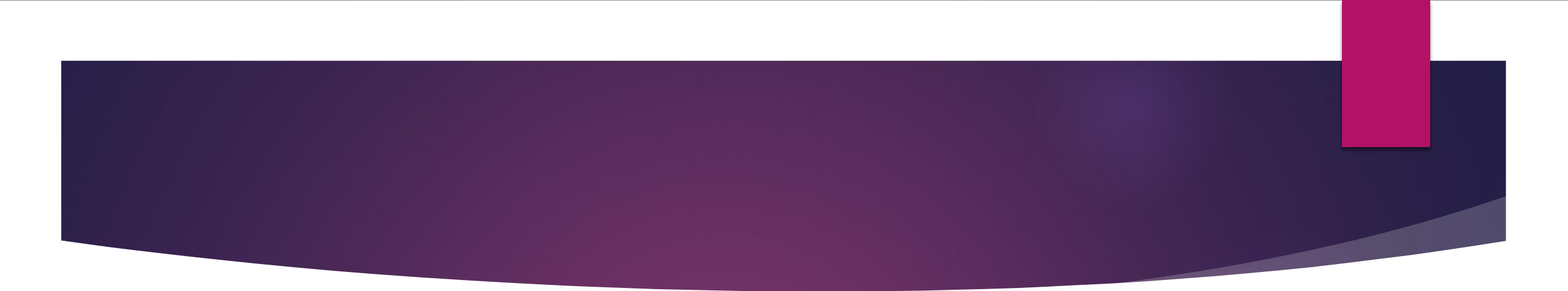
- ▶ EMOTIONAL ATTACHMENT TO OFFENDER
- ▶ ECONOMIC HOUSEHOLD SUPPORT
- ▶ DISTANCES TO TESTIFY
- ▶ CULTURAL BARRIERS
- ▶ LIMITED ACCESS TO PHONE/HELP
- ▶ UNFAMILIAR WITH COURT
- ▶ FEAR
- ▶ “LOVE”

SEXUAL VIOLENCE & DOMESTIC VIOLENCE

- ▶ Is your victim ashamed?
- ▶ Maybe the sexual relationship is used to stop the abuse

INTESE FEAR

- ▶ STRANGULATION
 - ▶ Figuratively silencing victim
 - ▶ Literally silencing victim
- ▶ ESCALATION IN VIOLENCE



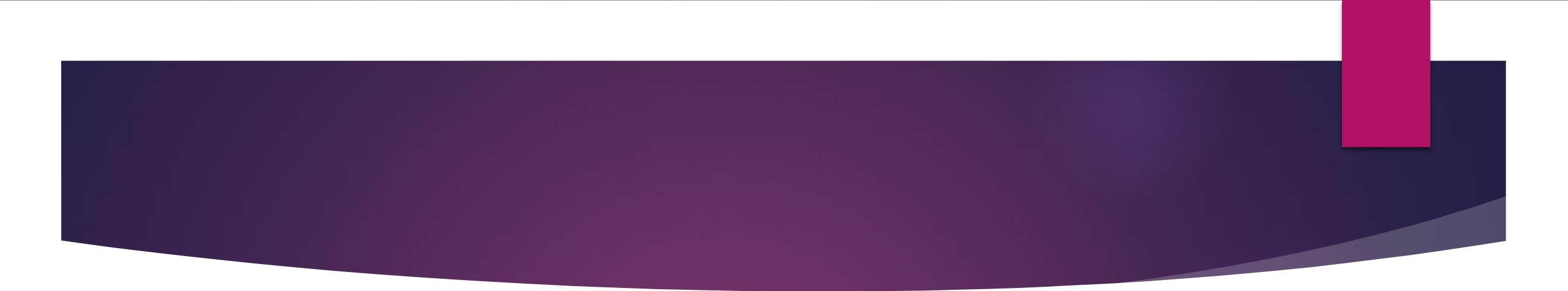
“Surviving victims of strangulation assault are 750% more likely of becoming a homicide victim.”

Glass, et al, 2008, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/>

TRUAMA

A traumatic event is defined as 'exposure to actual or threatened death, serious injury, or sexual violence'

American Psychiatric Association. (2013). Diagnostic and statistical manual of mental disorders (5th ed.). Washington

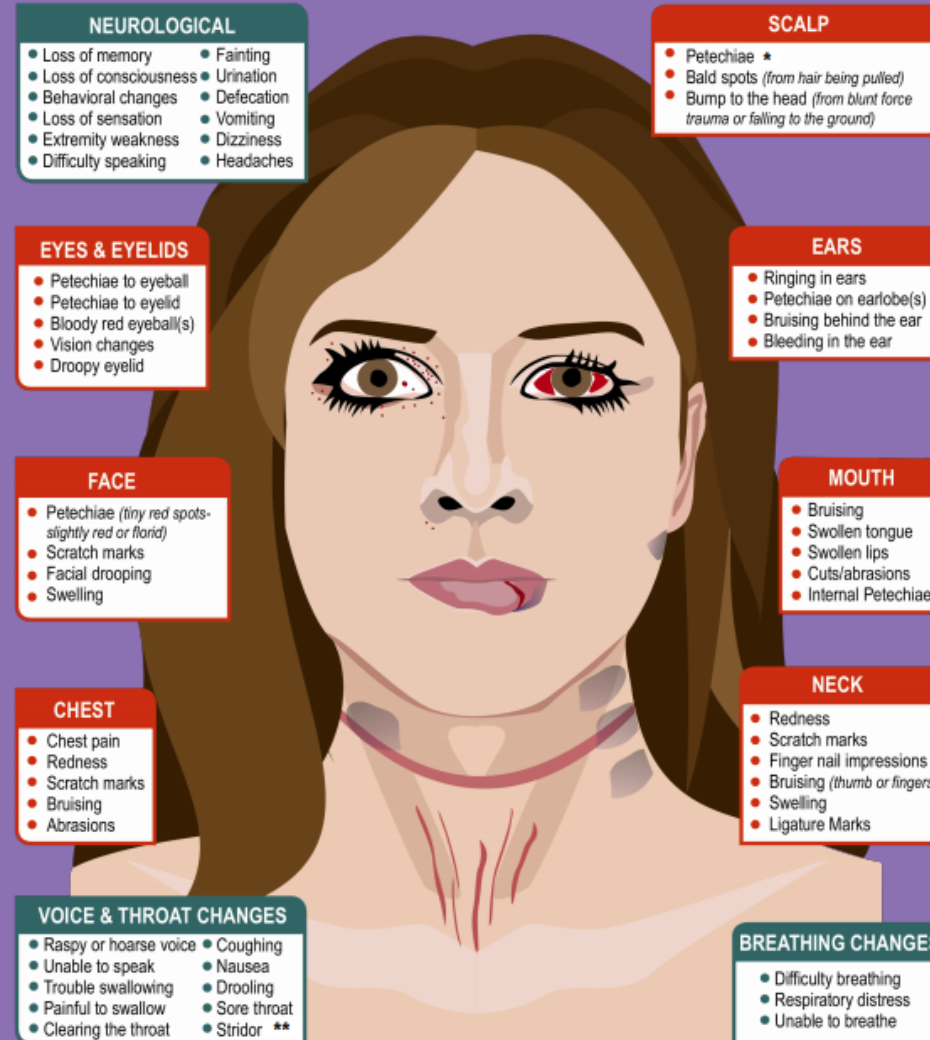
- 
- ▶ “Survivors themselves don’t know that the violence they have sustained can lead to unseen brain injuries —and may think their symptoms are a result of trauma or other mental health issues resulting from the abuse,” Dr. Nemeth adds.

Journal of Aggression, Maltreatment and Trauma

MAIN STRESS CHEMICALS RELEASED

- 1. Catecholamines (Natural Adrenaline)**
- 2. Corticosteroids (Energy)**
- 3. Opioids (Natural Morphine)**
- 4. Oxytocin (Good Feelings)**

SIGNS and SYMPTOMS of STRANGULATION



Source: Strangulation in Intimate Partner Violence, Chapter 16, Intimate Partner Violence. Oxford University Press, Inc. 2009.

* Petechiae = small (1–2 mm) red or purple spots on the skin

** Stridor = abnormal, high-pitched breathing sound

INJURY TYPES: BLUNT FORCE TRAUMA

▶ ABRASIONS

A scraping injury resulting in the rubbing off of the superficial layers of the epidermis. Abrasions may be patterned, such as those caused by ropes or the scraping "brush burns" characteristic of rapid rubbing contact with the pavement in traffic fatalities, or they may be non-patterned.



INJURY TYPES: BLUNT FORCE TRAUMA

► LACERATIONS

Tears in the skin produced by blunt force trauma that rips the skin apart. They are distinguished from cutting or incised wounds by the presence of tissue bridging within the laceration and by marginal skin abrasions.



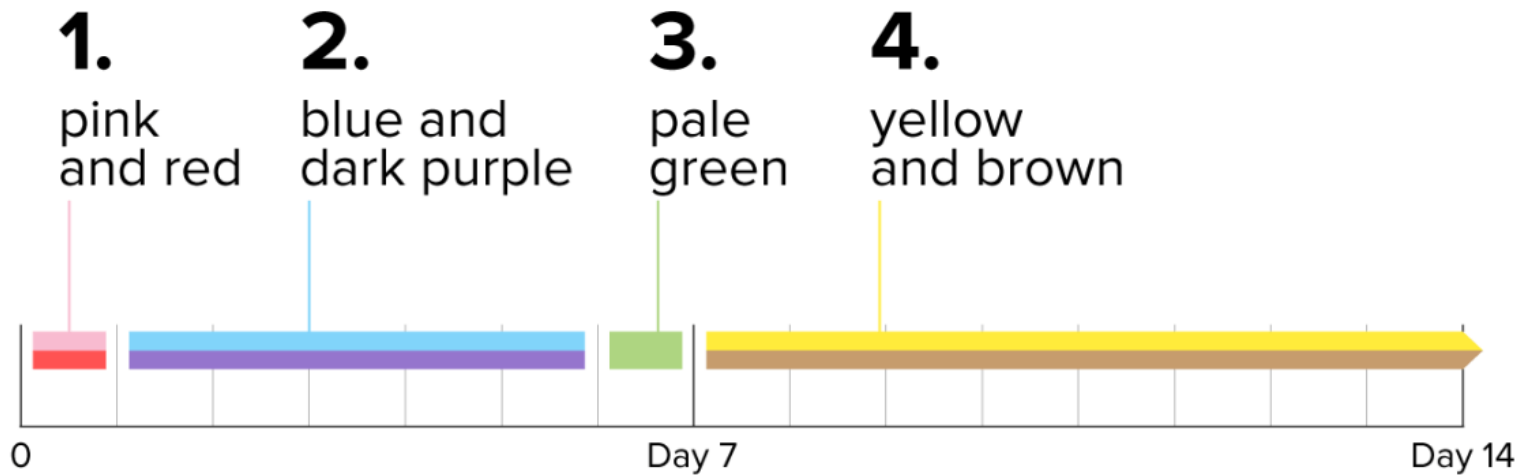
INJURY TYPES: BLUNT FORCE TRAUMA

▶ CONTUSIONS

result from injuries that cause hemorrhage beneath the intact skin and also may reflect a specific imprint pattern of the inflicting object, such as a ring on a fist or teeth in a bite mark



The Stages of Bruise Colors

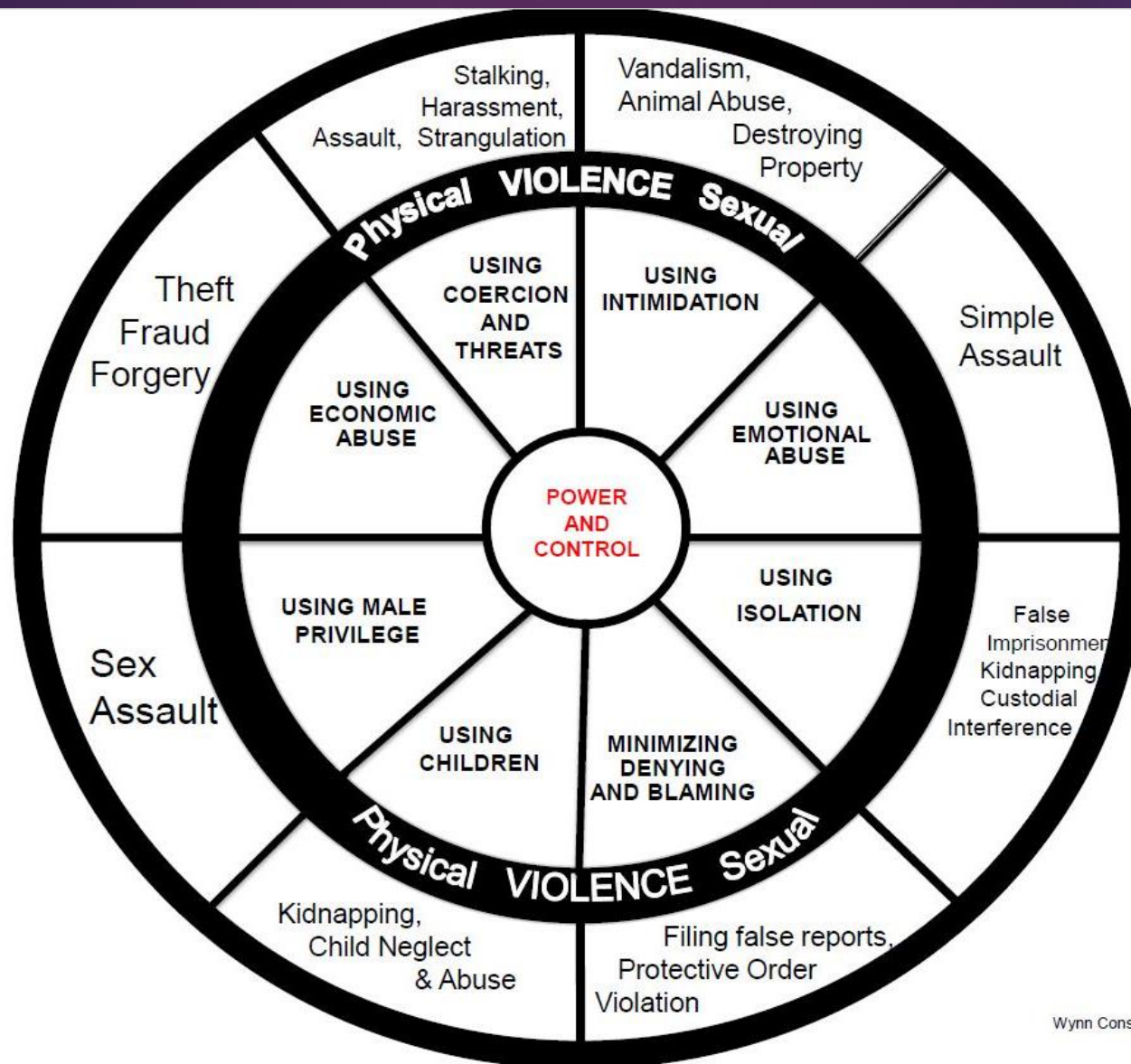


AGE OF
BRUISE

SO WHO CAN BE AN EXPERT????

ANYBODY

- ▶ Dr.
- ▶ Victim Advocates
- ▶ Tribal Members
- ▶ Detectives
- ▶ First Responders
- ▶ Forensic Nurses



HOW DO WE GET THE EXPERT

- ▶ DETECTIVES: FREEEEEEEEEEEEEEEEEE
- ▶ VICTIM ADVOCATES: also already paid but may run into issues with them being neutral witnesses
- ▶ DOCTORS: Going to have to pay them
- ▶ FIRST RESPONDERS/NURSES- Depends

DON'T FORGET TO PREPARE

- ▶ Just because they're cold does not mean they do not get prepped

